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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

DOCKET NO. 540

HUMILDA BALBAS GARDINER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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HUMILDA BALBAS GARDINER,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO: THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Humilda Balbas Gardiner, prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit for a review of the judgment entered herein on July 30, 1963.

Opinions Below

The opinion of the Court of Appeals has not as yet been officially reported (p. 7, Appendix).

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit sought to be reviewed was entered on July 30, 1963 (p. 13, Appendix). A timely petition for rehearing filed

August 16, 1963, was denied on September 12, 1963 (p. 14, Appendix).

The statutory provision conferring jurisdiction on this Court is found at 62 Stat. 928; Title 28, U.S.C. § 1254(1).

Questions Presented for Review

1. Since under *Hawkins* v. *United States*, 358 U. S. 74 (1958) the testimony of one spouse may be elicited only for the benefit of the other, may an indictment charging a wife with participating in a conspiracy with her husband and others who violate the Narcotic Laws be tried jointly under Rules 13 and 14 of the Federal Rules of Criminal Procedure with an indictment charging her husband with the same crime where the effect of such joint trial, because the husband exercises his constitutional privilege to remain silent, is to deprive the wife of the benefit of her husband's testimony?

2. Where a husband is charged with conspiracy with certain named persons, other than his wife, to violate the Narcotic Laws and thereafter his wife is indicted for the same crime and their indictments are tried jointly, is the wife's constitutional right under the Sixth Amendment to compulsory process abridged where the husband exercises his constitutional privilege under the Fifth Amendment to remain silent?

Constitutional Amendments and Statutes Involved

Constitution, Amendment Number V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor

shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution, Amendment Number VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Federal Rules Criminal Procedure, 18 U.S.C. Rule 13:

"The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information."

Federal Rules Criminal Procedure, 18 U.S.C. Rule 14:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

Statement of Case

The jurisdiction of the District Court was invoked because petitioner was indicted for an offense against the laws of the United States. 18 U. S. C. 3231.

On July 18, 1962 Robert Gardiner was indicted for conspiring with certain named persons, other than his wife, to smuggle marijuana into the United States in violation of 21 U.S.C. 176(a). Thereafter on August 30, 1962 his wife, Hunilda Balbas Gardiner, the petitioner herein, was indicted for conspiring with him and others to commit the same crime. Over her objection, the indictments were consolidated for trial. The indictments were tried together September 17 through September 22, 1962. Petitioner testified on her own behalf and on behalf of her husband. Her husband, however, exercised his constitutional privilege and remained silent. Both petitioner and her husband were convicted. She received a five year sentence, and he twenty years.

Reasons for Allowance of the Writ

The petition for a writ of certiorari should be granted because the Court of Appeals, in sanctioning the joint trial of husband and wife for conspiring to violate the narcotics laws where the wife was deprived of her husband's testimony because he exercised his constitutional right to remain silent, decided an important question of federal law which has not been, but should be, settled by this Court.

In its brief in the Court of Appeals in opposition to petitioner's application for a rehearing, the government argued, "One defendant has no standing to complain of his co-defendant's invocation of the privilege against self-incrimination on the ground that he is deprived of the benefit of the co-defendant's testimony", and that such rule must be applied even where the co-defendants are

husband and wife. It is true that the courts have rejected the argument that one co-defendant may not obtain a severance upon the ground that he will be deprived of the testimony of a co-defendant who exercises his constitutional privilege against self-incrimination. *Olmstead* v. *United States*, 19 F. 2d 842 (Cir. Ct. 9, 1927); *United States* v. *Bentvena et al.* (decided June 13, 1963, Cir. Ct. 2) (not yet officially reported), *United States* v. *Berman*, 24 F.R.D. 26 (U.S.D.C.S.D. N. Y., 1959); *United States* v. *Van Allen*, 28 F.R.D. 329 (U.S.D.C.S.D. N. Y., 1961). We submit that this rule (which has never been passed upon by this Court) should not be applied where defendants are husband and wife.

The considerations influencing the courts in refusing to sever the trial of one defendant so that he may obtain the testimony of another have been (a) there is no assurance that the testimony sought will be favorable; (b) only one of the defendants may be tried last; (c) a Fifth Amendment plea is still available after the disposition of the co-defendant's case since there remains the possibility of other prosecutions under related statutes, and (d) the testimony sought is likely to be merely corroborative, and the admission of corroborative testimony rests in the discretion of the trial court. These considerations are not persuasive where the co-defendants are husband and wife.

In the first place, it must be assumed that one spouse will testify for the benefit of the other, and indeed under *Hawkins* v. *United States*, 358 U. S. 74 (1958), in a case such as this the testimony of one spouse may be elicited only for the benefit of the other. Secondly, the case does not involve many defendants; it involves only husband and wife, requiring only one additional trial. Reason and justice require that the husband be tried first so that the wife may have the benefit of his testimony on her trial. Thirdly, it cannot be assumed that a husband, if tried first, will refuse to testify for his wife for fear of prosecution under related statutes. Such an assumption is con-

trary to the presumption of innocence basic to our law. Finally, where husband and wife are charged with participating in a criminal conspiracy, it is clear that no one is more likely to have knowledge of the activities of one spouse than the other, and that such testimony must be assumed to rise above the status of corroborative testimony.

This Court has emphasized that in a criminal conspiracy trial "the trial judge has a continuing duty at all stages of the trial to grant severance if prejudice does appear" (*Schaffer* v. *United States*, 362 U. S. 511, 514). Here petitioner because her husband's indictment was tried jointly with hers could not call him to the stand, *United States* v. *Scully*, 225 Fed. 2d 111, certiorari denied 350 U. S. 897. Her constitutional right to compulsory process under the Sixth Amendment was therefore violated, and the trial judge erred in failing to grant her the severance to which she was entitled.

CONCLUSION

For the reasons set forth above, this petition for writ of certiorari should be granted.

October 10, 1963.

Respectfully submitted,

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APPENDIX

Opinion of Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS,

FOR THE FIFTH CIRCUIT.

No. 20182

ROBERT HENRY GARDINER,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

No. 20183

HUNILDA BALBAS GARDINER,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(July 30, 1963)

Before HUTCHESON, Circuit Judge, LUMBARD, Chief Judge,* and BROWN, Circuit Judge.

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* Of the Second Circuit, sitting by designation.

Appendix.

HUTCHESON, Circuit Judge: The appellants were tried together and convicted, under separate indictments, for conspiring to smuggle marihuana from Mexico into the United States, transport it to New York, and sell it there, knowing it to have been smuggled, in violation of 21 U.S.C.A. Sec. 176(a). The indictment against Robert Gardiner, which was returned first, alleged that he conspired with Arthur Athens, Alberta Edelstein Curtis, and Colette Suzanne Meyers, as well as other, unidentified persons. The later indictment against Robert's wife, Hunilda Balbas Gardiner, is identical to the earlier one, except that Robert is therein named as a conspirator with her and the indictment alleges an additional overt act in which she participated, namely, that on or about October 29, 1960, Hunilda met Alberta Curtis at Monterrey, Mexico.

At the trial, the government produced the testimony of Athens and Mrs. Curtis that Athens first met Robert Gardiner in New York City, through Arthur Curtis, the husband of Mrs. Curtis, in connection with a sale of marihuana by Gardiner to Athens, the sale being arranged by Arthur Curtis. Subsequently, Gardiner offered Athens an opportunity to go into business with him, Gardiner stating that he had a source of supply in Mexico, an established method for smuggling the marihuana to New York, and a group of customers in New York; however, Gardiner stated that he wished to remain in Mexico, while someone else handled the sales and transportation aspects of the business. To demonstrate to Athens the substantial nature of his business, Robert showed him a supply of marihuana that he had on hand and introduced him to some of his customers, including Max Goldstein, to whom Robert made a sale in Athens' presence, and who *confirmed* this as a government witness at the trial.

Athens agreed to the partnership. Subsequently, and pursuant to that agreement, Athens and Robert Gardiner

smuggled two loads of marihuana across the Mexico-Texas border; Colette Meyers, who joined the conspiracy after the first crossing, carried the second load across.

Preparing for the third shipment across the border, Athens secured the agreement of Mrs. Curtis to make the crossing. Mrs. Curtis traveled to Monterrey, where Robert Gardiner contacted her. Hunilda Gardiner was present at the meeting between Robert and Mrs. Curtis. Robert discovered that there was room in Mrs. Curtis' rented car for more marihuana than he had prepared for shipment; the three therefore went to the Gardiners' motel, where Robert and Hunilda rolled additional marihuana in "footballs". The three then drove to the outskirts of town where, while Hunilda and Mrs. Curtis served as lookouts, Robert concealed the marihuana in the car. Mrs. Curtis then left Monterrey for Laredo; she was apprehended while crossing the border with the marihuana, and, subsequently, the entire smuggling operation was uncovered.

The appellants assert a number of specifications of error, some of which involve points not raised below and none of which justify either elaborate discussion or reversal.

Three of the specifications are asserted only by Hunilda Balbas Gardiner. She contends, first, that the trial court erred in consolidating the indictments for trial and in overruling her motion for a separate trial. It is argued that most of the evidence adduced at the trial concerned only Robert Gardiner's participation in the conspiracy, and that her defense was prejudiced by the confusion between that evidence and the evidence less in quantity which tended to show her participation in the conspiracy. It is evident, however, that Hunilda and Robert were being tried for participating in the same conspiracy, that is, in one continuing agreement to effectuate a single, unified

purpose, namely, to smuggle marihuana into the United States and to sell it here. Thus, all of the evidence was relevant against Hunilda insofar as it went to show the existence of the conspiracy, and it could, and no doubt would, have been introduced against her in a separate trial. While it is true, as she argues, that the court did not specifically instruct that, for the purpose of showing her participation in the conspiracy (as opposed to the existence of the conspiracy in which she allegedly participated), the evidence showing Robert's participation would not be relevant, and, while such an instruction might have been desirable, we think that the charge, taken as a whole, sufficiently delineated the evidence going to show Hunilda's participation; the court instructed, also, that the burden was on the government to prove, not Hunilda's mere knowledge of the conspiracy, but her participation in it.

Mrs. Gardiner contends, further, that the trial court erred in overruling her motions for acquittal, on the theory that the only evidence linking her with the conspiracy was the testimony of Mrs. Curtis who, having previously been convicted of participating in the conspiracy, was interested in possible leniency for herself and for her husband, whose trial for participation in the conspiracy was still pending; additionally, Mrs. Curtis' testimony did not stand uncontradicted. At most, however, an issue was raised as to Mrs. Curtis' credibility. Furthermore, there was other evidence tending to show Mrs. Gardiner's participation in the conspiracy. The witness Athens testified that, on his second trip to Mexico, he and Robert Gardiner worked for several hours for each of the three days preparing marihuana for shipment in the apartment in which the Gardiners were staying, and that Hunilda drove him and Robert to the airport where they checked four suitcases, two of which contained

marihuana. There was evidence presented as to the New York bank account of Mrs. Gardiner, which evidence tended to show that the account was being used for the purpose of transmitting the proceeds from the sale of the marihuana from New York City to the Gardiners in Mexico. We think it clear, when all of the evidence is considered, that the trial court was amply justified in overruling the motions for acquittal.

Finally, Hunilda Gardiner contends that the trial court erred in overruling her motion for continuance, inasmuch as the trial began less than three weeks after the indictment was returned against her. Aside from the assertion of the general proposition, she makes no attempt to show wherein she was prejudiced by the court's action, nor did she show below why she needed additional time to prepare her defense, except for general statements that she needed to secure more witnesses. The trial court did not err in overruling the motion.

As to the government witnesses Athens and Mrs. Curtis, both appellants contend that the court erred in charging that their earlier sentences could not now be changed, thereby "in effect testifying to the jury" that those convicted accomplice witnesses had nothing to gain by testifying and thus advising the jury of facts not introduced into evidence. The appellants made no objection to that charge in the trial court and hence cannot now complain of it. Rule 30, Fed. Rules Crim. Pro. 18 U.S.C.A.; *Faking* v. *United States*, 5th Cir. 1962. 299 F. (2) 579.

As to the government witness, Max Goldstein, it is argued that the court erred in failing to charge that Goldstein was an accomplice or, alternatively, in failing to instruct the jury that it should determine whether he was an accomplice, and that, in either event, his testimony should be viewed with caution. Appellants did not request such a charge; again, they are confronted with the dictate

of Rule 30. Indeed, it is evident that Goldstein was not an accomplice to the conspiracy, having been only a customer of Robert Gardiner, who introduced him to Athens before the conspiracy began. The appellants also attack that portion of the charge in which the judge stated that he regarded Goldstein as a forceful witness for the government, one having nothing to gain or lose by the outcome of the case. Here, once more, the appellants make their complaint for the first time. We think it beyond cavil that the appellants have failed clearly to show such prejudice as would constitute an abuse of discretion, particularly abuse cognizable as plain error under Rule 52(b), Fed. Rules Crim. Proc. 18 U.S.C.A.

We have considered the other arguments advanced by the appellants and find them without merit.

No showing of reversible error is made. The judgment is AFFIRMED.

Appendix.

Judgment

UNITED STATES COURT OF APPEALS,

FOR THE FIFTH CIRCUIT.

OCTOBER TERM, 1962

No. 20,183

D. C. Docket No. 18,294 Crim.

HUMILDA BALBAS GARDINER, Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

Before HUTCHESON, Circuit Judge, LUMBARD, Chief Judge,* and BROWN, Circuit Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 30, 1963.

Issued as Mandate:

* Of the Second Circuit, sitting by designation.

Appendix.

On Petition for Rehearing.

IN THE

UNITED STATES COURT OF APPEALS,

FOR THE FIFTH CIRCUIT.

No. 20,183

HUSNILDA BALDAS GARDINER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

(September 12, 1963.)

Before HUTCHESON, Circuit Judge, LUMBARD, Chief Judge,* and BROWN, Circuit Judge.

PER CURIAM:

It is ordered that the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

* Of the Second Circuit, sitting by designation.

BRIEF FOR THE UNITED STATE IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 540

HUNILDA BALBAS GARDINER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 7-12) is reported at 321 F. 2d 159.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1963 (Pet. 13). A petition for rehearing was denied on September 12, 19 (Pet. 14). The petition for a writ of certiorari was filed on October

11, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a wife could properly be tried with her husband for participation in the same conspiracy.

RULES INVOLVED

Federal Rules of Criminal Procedure

Rule 13 provides:

> The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

Rule 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT

In the United States District Court for the Southern District of Texas, two indictments were returned charging conspiracies to smuggle, to conceal, and to facilitate the transportation of marihuana in viola-

tion of Section 2(h) of the Narcotic Drugs Import and Export Act, as added, 70 Stat. 570, 21 U.S.C. 176a (R. 11-19). The first indictment named Robert Gardiner—petitioner's husband—as the sole defendant and charged that his co-conspirators were Arthur Athens, Alberta Curtis, and Colete Meyers (R. 11-14).[1] The second indictment, which was returned six weeks later, was identical with the first in all relevant particulars except that petitioner was the sole defendant, and her alleged co-conspirators were the four persons named in the first indictment—Athens, Curtis, Meyers, and petitioner's husband (R. 15-19). Petitioner moved that the indictments not be consolidated for trial because the date fixed for a joint trial did not afford her sufficient time to prepare a defense (R. 22-25, 47-56). Her motion was denied, and petitioner and her husband were jointly tried before a jury and convicted (R. 30, 997). Petitioner was sentenced to five years' imprisonment, the minimum term permissible under the statute (R. 999-1000).

Petitioner appealed the conviction, arguing, *inter alia*, that she was prejudiced by the joint trial in that there was insufficient time to prepare a defense and that most of the testimony related solely to her husband's acts. The court of appeals unanimously affirmed (Pet. 7-12; 321 F. 2d 159). In a petition for re-

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[1] Athens and Curtis were tried and convicted in 1961 for their participation in the conspiracy. See *Curtis* v. *United States*, 297 F. 2d 639 (C.A. 5), certiorari denied, 369 U.S. 838.

[2] See pages 6-16 of petitioner's brief in the court of appeals which we have lodged with the Clerk of this Court.

hearing, which was denied, petitioner contended that the joint trial deprived her of the benefit of her husband's testimony.

The trial testimony may be summarized as follows:

Arthur Athens testified that Robert Gardiner approached him in New York City and solicited him to smuggle marihuana into the United States (R. 125). Gardiner had access both to a supply in Mexico and to customers in New York (R. 125). As a result, Athens went to Monterrey, Mexico, in August 1960, received marihuana from Gardiner, and sold it in New York (R. 130-148).

The next month, on a second trip to Mexico, Athens visited Gardiner's rooms at a hotel in Veracruz and there met petitioner (R. 156). One of the rooms was a large shower room filled with marihuana leaves (R. 157). For three days, petitioner tended the apartment and the two men rolled the leaves into smaller packages (R. 158), which were later hidden in an automobile and driven across the border by Colette Meyers (R. 158-163). After meeting Meyers on the American side of the border, Athens arranged to have the marihuana shipped to New York, where it was sold to Gardiner's customers (R. 166-169). Athens deposited the proceeds from the sales in a Manhattan checking account belonging to petitioner (R. 171).

In October, another trip was attempted (R. 180). Athens remained in Laredo while Alberta Curtis drove to Monterrey to meet Gardiner (R. 174-175, 402). After the meeting, she was driven to a motel where

she watched Gardiner and petitioner roll marihuana leaves into packages (R. 412-418). Later, while petitioner and Mrs. Curtis stood watch, Gardiner hid the packages in an automobile (R. 419, 421). Mrs. Curtis departed in the car with the marihuana and was arrested at the border (R. 427-429).

ARGUMENT

Petitioner's contention that the joint trial deprived her of the benefit of her husband's testimony and violated her constitutional right to obtain compulsory process (Pet. 2) was raised for the first time in a petition for rehearing in the court of appeals (R. 1025-1027). Although petitioner challenged the joint trial in both the district court and the court of appeals, on neither occasion did she suggest that the benefit of her husband's testimony was being withheld from her. The issue raised in the petition is therefore not properly before this Court.

Certainly petitioner is in no position to complain that the trial court abused its discretion in refusing to grant relief from joinder on a ground never suggested to that court. On the face of it, it was entirely proper under Rule 13 to consolidate for trial the two indictments charging the same conspiracy, the second of which merely joined petitioner as a party. This Court has held that a husband and wife can be joined in a single conspiracy indictment. *United States* v. *Dege*, 364 U.S. 51. Moreover, petitioner concedes (Pet. 5) that the fact that one defendant may be deprived of the testimony of a co-defendant is not

sufficient reason in itself to grant separate trials. *Gorin* v. *United States*, 313 F. 2d 641, 645-646 (C.A. 1), certiorari denied, 374 U.S. 829; *Olmstead* v. *United States*, 19 F. 2d 842, 847 (C.A. 9), affirmed on other grounds, 277 U.S. 438. A determination of prejudice within the meaning of Rule 14 requires a sensitive evaluation of the facts and of the respective needs of the government and the accused. It is a factual determination which is best made in the first instance by the district judge, and which may not be disturbed unless clearly erroneous. See also *Campbell* v. *United States*, 373 U.S. 487, 493; *Schaffer* v. *United States*, 362 U.S. 511, 515-516.

Nor has petitioner been deprived of the right to compulsory process guaranteed by the Sixth Amendment. As noted above petitioner never suggested to the trial court that she wished the benefit of her husband's testimony. Moreover, that right comes into play only in circumstances where the government has power to compel a witness to take the stand. *Gorin* v. *United States*, *supra*; *cf. United States* v. *Greco*, 298 F. 2d 247 (C.A. 2), certiorari denied, 369 U.S. 820. Here the government possessed no such power since there was no reason to believe that the husband would not assert his Fifth Amendment privilege when called upon to testify in his wife's trial.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1963

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